

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No.: 2013-000820

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Case No.: 2012-CP-18-0393

Mattie D. Murphy, Circuit Court Judge

Lauren L. Kyle.....Appellant,

v.

Dorchester County Chapter SPCA,
a/k/a Francis R. Willis SPCA.....Respondent.

RESPONDENT'S FINAL BRIEF

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. THE CIRCUIT COURT PROPERLY HELD THAT WHILE PERFORMING HER PUBLIC SERVICE EMPLOYMENT, APPELLANT WAS AN "EMPLOYEE" OF THE SPCA PUSUANT TO THE WORKERS COMPENSATION ACT.**
- II. THE CIRCUIT COURT'S ORDER PROPERLY TOOK INTO ACCOUNT PUBLIC POLICY CONSIDERATIONS OF PUBLIC SERVICE EMPLOYMENT PROGRAMS.**

STATEMENT OF THE CASE

This case appeal stems from a personal injury suit filed against Respondent, Dorchester County Chapter SPCA ("SPCA"), by Appellant, Laurent Kyle, ("Kyle"). Kyle was bitten by a cat at the SPCA while she was performing public service employment through the South Carolina Department of Probation, Parole and Pardon Services. On December 28, 2009, Kyle submitted a complaint against the SPCA for personal injuries stemming from the cat bite¹. The case was stricken from the docket pursuant to Rule 40(j), SCRCP, and subsequently restored by order of the court on January 16, 2012. On May 17, 2012, the SPCA filed a motion to dismiss for lack of subject matter jurisdiction, the basis being that Kyle's remedy for her injury was under the Workers Compensation Act. A hearing on the motion was held on or about August 29, 2012, and on November 7, 2012, the circuit court issued an order November 7, 2012 granting the SPCA's motion. On March 6, 2013, the Court issued an order denying Kyle's motion for reconsideration. Kyle filed a Notice of Appeal to this Court on April 2, 2013.

¹ The complaint was signed on December 28, 2009, but was not stamped as filed until January 6, 2010

STATEMENT OF THE FACTS

Appellant Lauren Kyle was arrested on June 16, 2006 in connection with the robbery of a home. (R. 48) On or about January 25, 2007, Kyle pleaded to a lesser offense and received probation, a fine, and public service employment. (R. 48) Ms. Kyle performed her public service employment through the South Carolina Department of Probation, Parole and Pardon Services, (herein after sometimes referred to as “the Department”). (Id.). She was given the choice of performing her public service employment at the city dump in Summerville, or at the Dorchester County SPCA, which had an agreement with the Department to participate in its “Public Service Employment Program.” (R. 48, 35-37, 41, 42-44) The SPCA is an animal shelter in Summerville that cares for and houses homeless pets and offers such pets for adoption to the public. Kyle chose to perform the first portion of her public service at the SPCA. (R. 48)

On or about November 20, 2007, while Kyle was performing her public service employment at the SPCA, she was bitten by a cat and suffered personal injuries. (Id.) (R. 11-17) She subsequently filed a negligence suit against the SPCA in the Court of Common Pleas for Dorchester County. (Id.) Kyle never filed a workers’ compensation claim for her injuries.

Subsequently, the circuit dismissed Kyle’s suit against the SPCA finding that Kyle’s injuries arose out of and in the course and scope of her public service employment and that her exclusive remedy was under the S.C. Workers Compensation Act. The court found that Kyle was a covered employee of the Department of Probation, Parole and Pardon Services during her public service employment pursuant to S.C. Code Ann. § 42-1-505, and that she was a statutory employee of the SPCA during her public service employment pursuant to S.C. Code Ann. § 42-1-400. (R. 3-8)

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DISMISSED APPELLANT’S LAWSUIT BASED ON THE HOLDING THAT WHILE PERFORMING HER PUBLIC SERVICE EMPLOYMENT, APPELLANT WAS AN “EMPLOYEE” OF THE SPCA PUSUANT TO THE WORKERS COMPENSATION ACT. AS SUCH, HER EXCLUSIVE REMEDY WAS UNDER THE WORKERS COMPENSATION ACT.

It is well-settled that a party without standing is subject to immediate dismissal. *Brock v Bennett*, 313 S.C. 513, 443 S.E.2d 409 (Ct App. 1994). The determination of whether a worker is a statutory employee is jurisdictional and, therefore, the question on appeal is one of law. *Posey v Proper Mold and Engineering, Inc*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App 2008) citing *Harrell v Pineland Plantation, Ltd*, 337 S C. 313, 320, 523 S.E 2d 766, 769 (1999). As a result, the court has the power to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. *Id* The court may consider affidavits on a question of law in a jurisdictional motion without converting the motion into one for summary judgment *Posey* at 378 S.C 217, 661 S.E.2d at 399

Under the South Carolina Workers’ Compensation Act, (“the Act”), an employer and employee are presumed to have accepted the provisions of the Act to pay and accept compensation for personal injuries arising out of an in the course of employment and are bound by the provisions of the Act. S.C. Code Ann § 42-1-310. When the employer and its employee have accepted the provisions of the Act, it shall exclude all other rights and remedies of such employee S C Code Ann § 42-1-540. “It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers’ Compensation Act.” *Id* citing *Dawkins v Jordan*, 341 S C 434, 439, 534 S E 2d, 700, 703 (2000).

A. Kyle Agreed to be Bound by the Workers' Compensation Act When She Accepted Public Service Employment as Part of Her Sentence.

The Act specifically recognizes that the Department of Probation, Parole and Pardon Services is considered the employer of any convicted person performing public service employment. Section 42-1-505 provides:

The Department of Probation, Parole, and Pardon Services may elect to cover convicted persons under its custody or supervision with workers' compensation benefits in accordance with the provisions of this title. For purposes of this section, the Department is considered the employer for those persons under its custody or supervision performing public service employment.

Accordingly, the Department provides convicted persons with workers' compensation insurance through the State Accident Fund. (R 35-37, 38-39) As evident by the Affidavit of Benjamin Aplin, and correspondence from Cynthia Burns Polk of the South Carolina State Accident Fund, the Department had workers' compensation insurance at the time of Ms. Kyle's public service employment and Ms Kyle was covered by such workers' compensation insurance. (R 38-39)

Moreover, the offender who will be performing the public service employment is notified via standard forms from the Department. (R 40) This form called "South Carolina Department of Probation, Parole and Pardon Service Public Service Employment-Contractual Agreement and Worksite Referral," states

4 I understand that if I am hurt at a public service job that I may be entitled to workers compensation benefits Since my services are not compensated, I agree that any work compensation benefits I may be entitled to will be based upon the laws and regulations applicable to inmates of the South Carolina Department of Corrections and that any income I may earn elsewhere will not be used to compute such benefits.

(R. 40)

This standard form is evidence that as a condition of public service employment, Kyle agreed to and accepted the provisions of the Workers' Compensation Act. As such, the Act is her sole remedy and the Circuit Court properly dismissed her action for lack of subject matter jurisdiction.

B. Kyle was An Employee for Purposes of the Act, and as such, her Exclusive Remedy is Under the Provisions of the Workers' Compensation Act.

1. Kyle was a Statutory Employee of the SPCA.

In addition to her acceptance of the Workers Compensation Act as part of her public service employment, Kyle also meets the definition of a "statutory employee" of the SPCA.

The Act provides at S.C. Code Ann. § 42-1-400 that

When any person, . . . referred to as "owner," undertakes to perform or execute any work which is a part of his trade business or occupation and contracts with any other person . . . for the execution or performance by [that other person] of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under [the Act] which he would have been liable to pay if the workman had been immediately employed by him.

The South Carolina Supreme Court has interpreted this statute to mean that the exclusivity provision applies to both direct and "statutory employees." Section § 42-1-400 has been extended to cover an injured worker of a subcontractor performing work which is part of the owner's trade, business or occupation. *Voss v Ramco, Inc*, 325 S.C. 560, 566, 482 S.E.2d 582, 585 (Ct. App. 1997), see also *Carter v Florentine Corp, Inc*, 310 S.C. 228, 230-1, 423 S.E.2d 112 (1992).

Three factors must be considered when determining if an individual is a statutory employee under the Act: "(1) Whether the activity is an important part of the trade or business, (2) whether the activity is a necessary, essential and integral part of the trade or business, and (3)

whether the identical activity has been performed by employees of the principle employer. *Bailey v Owen Electric Steel Company of South Carolina*, 298 S.C. 36, 378 S.E 2d 63, 64 (Ct. App. 1989) If the work in which an individual was engaged meets even one of these tests the worker qualifies as a statutory employee. *Olmstead v Shakespeare*, 354 S.C. 421, 424, 581 S.E 2d 483, 485 (2003).

In *Bailey*, the Plaintiff, an employee of Ironworkers, Inc , was injured while connecting an exhaust system to a furnace at Owen Electrical Steel Co 's plant. Bailey sued Owen for personal injuries alleging negligence and recklessness. *Id* at 37-38, 378 S E 2d at 64. The court dismissed the action for lack of subject matter jurisdiction finding that Bailey was a statutory employee of Owen at the time of accident *Id*

The Court of Appeals, using the three factors listed above to determine the statutory employee issue, found that the facts presented satisfied not one but all three factors. *Id* at 39, 378 S.E 2d at 64. The *Bailey* court found that operational furnace duct work was required by state and federal laws, that the duct work was regularly maintained until it was necessary to replace it, replacement of the duct work was required every other year, and that Owen's maintenance crew replaced the duct work in the past *Id* at 39, 378 S E.2d at 64-65.

Accordingly, the court concluded that that the work being performed by Bailey at the time of his injury was a part of the trade, business or occupation of Owen and Bailey was, therefore, a statutory employee limited to the exclusive remedy of workers' compensation *Id*

It is not disputed that the SPCA was not Kyle's direct employer at the time of the injury. However, as in *Bailey*, Kyle is a statutory employee of the SPCA The SPCA had an agreement with the Department to take on its employees to perform their public service employment (R 41, 42-44) At the time of the incident, Kyle was cleaning out the animals' cages (R 66-69)

This is an important duty to the SPCA's business, it is necessary to the SPCA's business and this identical activity is often performed by SPCA direct employees. (R. 42-44) The SPCA establishes all three factors compelling the conclusion that Kyle was a statutory employee of the SPCA, whose exclusive remedy is a workers' compensation claim. *See Bailey supra* Moreover, as part of the agreement between the Department and the Worksite under the Public Service Employment Program, the Department agreed to "Provide workers' compensation insurance coverage for on-the-job injuries to the PSEP offender." (R. 41, 42-44)

As such, Kyle was a statutory employee for purposes of the Act, and through the course of her public service employment was covered by Workers Compensation Insurance which was provided by the Department *See Bailey v Owen Electric Steel Co of South Carolina, Inc*, 298 S.C 36, 378 S.E.2d 63 (1989) (R. 35-44)

2. Kyle Was Not a Volunteer.

Ms Kyle argues that she cannot be considered an employee of the SPCA subject to the Workers' Compensation Act because she was not compensated, but rather "was made to do chores at the SPCA." First, as previously discussed, she agreed to be subject to the Workers' Compensation Act when she accepted Public Service Employment as part of her sentence. (R. 38-40). Nonetheless, She relies on three main cases, *McCreery v Covenant Presbyterian Church*, 303 S.C. 271, 400 S.E 2d 130 (1990) (reversed on other grounds), *Doe v Greenville Hospital Sys*, 323 S C 33, 448 S.E 2d 564 (Ct App 1994), and *Shuler v Tri-County Elec Co-Op, Inc*, 374 S C 516, 649 S E 2d 98 (Ct App 2007) However, all three are inapplicable to the scenario at hand.

First, in *Shuler*, whether the Plaintiff was considered an employee turned on the application of the Electric Cooperative Act and the By-Laws adopted by the individual electrical

co-op. *Shuler* at 521, 649 S.E 2d at 100. The court stated, “To correctly determine the relationship of the parties in this case, we must next turn our attention to the language of the Electric Cooperative Act and the by-laws adopted by the individual co-op pursuant to the provisions of that act.” . . . “While we are required to construe the Workers Compensation Act liberally in favor of coverage, the same is not true in the interpretation and construction of either the Electric Cooperative Act or the by-laws adopted pursuant thereto.” *Id* at 521-22, 649 S E.2d at 101. Accordingly, *Shuler* is not relevant to the analysis at hand

Second, *McCreery and Doe* both involved cases in which the courts found that the plaintiffs were volunteers, not employees. In *McCreery*, the Court of Appeals found that Plaintiff donated his construction services to the church and was a volunteer as there was no evidence that he was entitled to anything in exchange for his work such as payment of wages or credit to satisfy a tithing obligation.

In *Doe*, the court held that a 16 year old candy-stripper at a hospital was a volunteer. Contrary to Kyle’s argument, the *Doe* court did not hold that classroom credit, and job training did not constitute payment for services or required to establish an employment relationship. Rather, the court noted that *Doe* received classroom and on the job training regarding her duties as a candy stripper. “Mary Doe was an unpaid volunteer candy striper. She received classroom and on the job training concerning her duties ” *Doe* at 39, 448 S.E 2d at 567-68 The *Doe* court concluded that “based upon the record, we find no error in the court’s conclusion that Mary Doe was not an employee under the Workers’ Compensation Act ”

Neither Plaintiff in *McCreery* or *Doe* where required to perform their duties, and neither received or nor did they have the right to demand any type of compensation, money or otherwise. They were volunteers. Ms. Kyle does not fall into this category. She was not donating her time

to the SPCA out of goodness of heart. She was required to perform these duties in exchange for credit for to satisfy her sentence. Kyle certainly had the right to demand, upon completion of her public service employment, the credit to satisfy the public service employment component of her sentence. Accordingly, she was not a volunteer.²

II. THE CIRCUIT COURT'S ORDER PROPERLY TOOK INTO ACCOUNT PUBLIC POLICY CONSIDERATIONS OF PUBLIC SERVICE EMPLOYMENT PROGRAMS.

The Circuit Court properly considered the public policy issues surrounding a rule of law that would allow offenders to sue public service employers. In order for the criminal justice system to work properly and efficiently, businesses, such as the SPCA need to be willing to take on convicted persons for their public service employment. These businesses would be significantly less likely to participate, (or to participate at all), in the Department's program if there is the change that convicted persons will sue them for injuries incurred while completing their public service employment. The Department's public service employment program also benefits offenders who, without the program could be subject to jail time.

The Department covers convicted persons with Workers' Compensation Insurance seemingly, to encourage businesses to participate in the public service employment program and also to protect those people performing their public service employment.

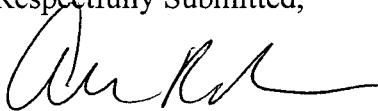
The Circuit Court properly took into account the public policy considerations when issuing the ruling.

² While not discussed in the Appellant's brief, Kyle also could be considered a "lent employee" under the analysis of *Nix v. Columbia Staffing, Inc.*, 322 S.C. 277, 471 S.E.2d 718 (Ct. App. 1996) (holding that "whether an employee furnished by one person to another becomes a 'lent employee' is whether the person passes under the latter's right of control with regard not only to the work to be done, but also to the manner of performing it." *Id.* at 281, 471 S.E.2d at 720. See Ex D and E to Memorandum in Support of Motion to Dismiss (SPCA was responsible for controlling managing and supervising the work of convicted persons assigned to it by the Department).

CONCLUSION

Appellant Kyle accepted the provisions of the Workers' Compensation Act as part of her public service employment. Moreover, Kyle also satisfies the Act requirement of an employee of the SPCA, whether "statutory" under the analysis of *Bailey*, supra, and the subsequent cases, or as a "lent" employee under the *Nix*, supra, analysis. As such, her remedy for the injuries sustained in the course of that public service employment is under the South Carolina Workers' Compensation Act. The Circuit Court properly dismissed her complaint.

Respectfully Submitted,



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Mattie D. Murphy, Circuit Court Judge

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Dorchester County Chapter SPCA,
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PROOF OF SERVICE

I certify that I have served Respondent's Final Brief by depositing a copy in the U.S.

Mail, postage paid on May 1, 2015 addressed to Appellant's attorney as set forth below:

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Honorable Jenny Abbott Kitchings
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Re: Lauren L. Kyle v. Dorchester County Chapter SPCA
a/k/a Francis R. Willis SPCA
Case No.: 2012-CP-18-393
Appellate Case No.: 2013-000820
Claim No.: 72-258-10
MLF File No.: 104.088

Dear Ms. Kitchings:

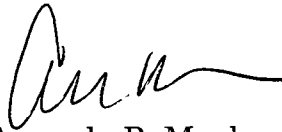
Enclosed please find the original and (15) copies of Respondent Dorchester County Chapter SPCA a/k/a Francis R. Willis SPCA's Final Brief, along with the original and one copy of the Proof of Service for the above referenced Brief. Please file the original and return the clocked in copies for our file. A self-addressed, prepaid envelope is provided for this purpose.

By copy of this letter to Waring Howe, counsel for Appellate, I am serving him with a copy of the Final Brief and Proof of Service by U.S. Mail.

Should you have any questions, please do not hesitate to call.

With kind regards, I am

Yours truly,

A handwritten signature in black ink, appearing to read 'Amanda', with a long horizontal flourish extending to the right.

Amanda R. Maybank

ARM/tgw

Enclosures

cc: Warring S. Howe, Jr., Esquire (by U.S. Mail)